

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
THEODORE W. MELLOTT, JR.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
JERRY MCCULLY,

Respondents.

PCHB No. 84-195

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, an appeal of the issuance of a Report of Examination recommending a temporary permit be issued under Surface Water Application No. S4-28373, came on before the Pollution Control Hearings Board; Lawrence J. Faulk and Gayle Rothrock (presiding) on October 23, 1984, all day at Yakima. Respondent elected a formal hearing pursuant to RCW 43.21B.230. Linda S. Hale of Yakima officially reported the proceedings.

Appellant Theodore W. Mellotte, Jr., was represented by attorney James Hovis. Respondent Department of Ecology (DOE) was represented

1 by Assistant Attorney General Allen T. Miller. Permittee Jerry
2 McCully represented himself.

3 Witnesses were sworn and testified. Exhibits were admitted and
4 examined. Argument was heard. From the testimony, evidence, and
5 contentions of the parties, the Board makes these

6 FINDINGS OF FACT

7 I

8 On January 17, 1984, a proposed water appropriation application
9 was filed by Jerry McCully, dba Goose Prairie Association, for
10 domestic water to serve seven (7) cabin homes on property near Bumping
11 River at 845 Bumping Lake Road in Goose Prairie. Withdrawals of water
12 are proposed to be from Webb Spring which is located on adjacent land
13 in the Wenatchee National Forest.

14 II

15 The applicant requested 0.12 cubic feet per second (cfs) up to 2.3
16 acre-feet per year (AF/yr.) for in-house domestic supply, for which
17 demand will be fairly constant in the summer and irregular in the
18 autumn, winter, and spring. In-house cabin water use should not
19 exceed 300 gallons per day. The dwellings are part of a planned unit
20 development, under the name of Goose Prairie Recreational Association,
21 approved by Yakima County through its planning process.

22 There are twelve dwellings on the plan, however, the applicant
23 asserts he is now prepared to build just seven and, certainly, his
24 recommended water withdrawal is only approved for seven cabin
25 dwellings. The State's Department of Social and Health Services

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(DSHS) will necessarily have to review the applicant's actual water delivery and service plans before any drinking water system is constructed and activated.

III

Several individuals in Goose Prairie have appropriated water from Webb Springs, which is associated with a stream, some number of these appropriations are of record and show as existing water rights or temporary permits.¹ The Department of Ecology has been granting only temporary water appropriation permits for water sources hydraulically related to rivers and streams in the large Yakima River system since an adjudication was launched in 1978.

There are six water rights and three temporary permits recorded on the subject spring, as presented at the hearing.

| <u>Surface Water Certificate</u> | <u>Name</u> | <u>Quantity</u> |
|----------------------------------|-------------|----------------------|
| 3571 | Knowles | .0025 cfs |
| 3902 | Howfield | .0025 cfs |
| 4297 | Foy | .0025 cfs |
| 4908 | I.H. Ford | .01 cfs |
| 5377 | Severn | .0025 cfs |
| 8479 | Adams | .01 cfs |
| <u>Temporary Permits</u> | | |
| S4-27316T | McCully | .01 cfs |
| S4-27317T | Mellotte | .02 cfs |
| S4-27501T | Gallant | .01 cfs |
| Total | | .07 cfs ² |

-
1. The current delivery system's sizing and length appear to have made it possible to deliver only .03 to .05 cfs to appropriators.

There is a system currently installed used by all the owners of rights which is based in a 4'x4'x5' reservoir and a one-inch pipe which leads from the mainline by gravity flow to the platted areas it serves in Goose Prairie. The springs are approximately 150 feet higher in elevation than the actual and proposed places of use and nearly 2,000 feet away from McCully's proposed development.

Appellant McCully's current temporary permit (S4-28316T) covers the same place of use as his proposed development. It has served one home, a restaurant and store and 21 recreational vehicle (R.V.) hook-ups. The hook-ups for R.V.'s are being removed and the seven cabins placed in their stead. The only other multiple domestic use authorized under permit is S4-27317T for eight cabins and nine transient trailers owned and managed by T. W. Mellotte.

IV

McCully contemplated drilling a well in his development plans to complement his water supply from the springs but came upon difficulties. He drilled unsuccessfully; no usable well could be established. It was asserted at hearing that DSHS and Yakima County are not as interested in McCully's actual source of supply as they are in its reliability and safety.

V

Appellant McCully's proposal involves construction of a 5,000 gallon storage tank by the springs which receives water from a high pipe off the existing concrete storage tank, which pipe could not intercept water from said tank until all existing rights and permits

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1 meet their allowed withdrawals. Then a gravity flow pipe (6 to 8
2 inches in diameter) would bring water down to his property. Since the
3 performance of the existing system is not all that it might be,
4 McCully and others will first hope to receive under its operation and,
5 only then, if there is a good water flow, will McCully confidently
6 satisfy his appropriation, up to the limit of his temporary permit.
7 This effectively makes McCully the most junior appropriator.
8 Particularly, as the DOE proposes to withdraw his temporary permit
9 SF-27316T and excise that portion of it allocating water for up to 21
10 trailer sites. McCully, a year-round Goose Prairie resident, also
11 expressed his willingness to build a new combined community system²
12 but, due to skepticism and uncertainty by various appropriators, that
13 offer is not now part of a recommended system for the intended
14 appropriation.

15 VI

16 In its cursory site investigation of the McCully application, the
17 Department of Ecology (DOE) responded to some protests received when
18 the application was published. Dr. C.A. Severn and T.W. Mellotte
19 mailed in letters of objection before the March 9, 1984, deadline. A
20 letter of concern was received from Mr. and Mrs. Gallant in late March.

21 The field investigation on June 1, 1984, resulted in further
22 communications with protestants but not complete interviews with
23

24 2. The existing system is apparently clogged and not cleaned out at
25 the springs.
26

1 certificate and permit holders of record. That would have been
2 advisable since the DOE heard vociferous and determined objections
3 from a few parties about the lack of available water from the current
4 system in July and August. The right holders are now hopelessly split
5 in their acceptance of the proposed new appropriation and/or its
6 delivery system, as evidenced by testimony at hearing.

7 Additionally, the DOE staff did a "professional eyeball"
8 assessment of the amount of flow from Webb Springs. Other
9 measurements could be used to ascertain the exact flow; measures
10 generally accepted in the hydrology, engineering, and geology
11 professional communities, even with the access problems to the site.
12 The staff's guesstimates may be good and fairly accurate; however, in
13 a stressed water supply situation a good instrument measure of flow
14 builds both confidence in the minds of neighboring appropriators and a
15 particularly accurate record for the DOE's files.

16 VII

17 The DOE determined there would be no interference with existing
18 rights, that water was available for appropriation, that this water
19 proposal was for a beneficial use, and that it would not be contrary
20 to the public interest. The determinations on some of these tests
21 were quite terse, and could profitably have carried some elaboration
22 in company with the written conclusions and shown descriptive
23 consideration of chapter 90.54 RCW as well as chapter 90.03.

24 The department considered any possible application of the State
25 Environmental Policy Act and, apparently, determined it did not apply

1 although such determination is not referenced in their written
2 report. The report issued on June 28, 1984.

3 VIII

4 Appellant Mellotte, feeling aggrieved by the recommendation in the
5 subject DOE report, filed his appeal with the Board on July 27, 1984.

6 IX

7 Any Conclusion of Law which should be deemed a Finding of Fact is
8 hereby adopted as such.

9 From these Findings, the Board comes to these

10 CONCLUSIONS OF LAW

11 I

12 The Board has jurisdiction over these persons and these matters.
13 RCW 43.21B.

14 II

15 This matter, the determination of a .12cfs water appropriation is
16 exempt from the Washington State Environmental Policy Act. RCW 43.21C
17 and WAC 197-10-170(2)(b).³ Whether and how Yakima County makes a
18 determination under SEPA for an entire planned unit development is a
19 matter to be reviewed in a court of general jurisdiction, if a
20 challenge arises.

21 III

22 Water appropriations must be tested for their ability to a) not
23 interfere with existing rights, b) be a beneficial use, c) use water
24

25 3. This WAC was applicable at the time the permit decision was made.
26 The same exemption is now placed at WAC 197-11-800(4)(b).

1 which is genuinely available, and d) be in the public interest. RCW
2 90.03.290, RCW 90.54 and Stempel v. Board of Water Resources, 82 Wn.
3 2nd, 109. 115 (1973). Evidence and testimony reveals there is a good
4 possibility such a water appropriation can meet these tests, but the
5 evidence is incomplete. A more exact measure of existing flow and of
6 the existing system condition and its performance is needed on record.

7 IV

8 The Department of Ecology has, correctly, not made determinations
9 properly reserved to the Department of Social and Health Services and
10 to Yakima County. RCW 43.21A. DOE did obtain necessary perspective
11 from these two agencies before being assured of its final decision.

12 V

13 To secure accuracy of assessment of available water and attend to
14 matters of the public interest this Report of Examination should be
15 remanded to DOE for fully accurate determination of existing flow and
16 the performance of the existing system and for fuller documentation of
17 remaining concerns of nearby appropriators. A Report of Examination
18 would then reissue and be accepted or, alternately, appealed to this
19 Board again. RCW 90.54 and RCW 43.21B.

20 VI

21 Any Finding of Fact which should be deemed a Conclusion of Law is
22 hereby adopted as such.

23 From these Conclusions the Board enters this
24
25

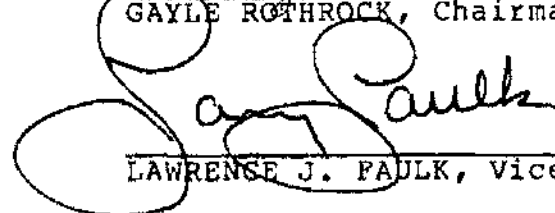
ORDER

DOE Report of Examination on permit S4-28373T is remanded for processing, in accordance with these Findings and Conclusions.

DONE this 14th day of December, 1984.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Chairman

 12/12/84
LAWRENCE J. FAULK, Vice Chairman